November 14, 1986

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: G[redacted] G[redacted] Y[redacted]

This is an appeal from an administrative determination of the Department of State holding that appellant, G[redacted] G[redacted] Y[redacted] expatriated herself on June 12, 1958 under the provisions of section 349(a)(1) of the Immigration and Nationality Act by obtaining naturalization in Canada upon her own application. 1/

The Department decided on August 24, 1979 that Mrs. Y[redacted] had expatriated herself. Six years later she appealed that determination.

Having considered all the circumstances in this case, we conclude for reasons set out below that the appeal is time-barred and should be dismissed.

I

Mrs. Y[redacted] became a United States citizen through birth at [redacted]. When she was seven years old her parents took her to Toronto, Canada. She states that she obtained a U.S. passport in 1956, attended teachers college in Toronto, and in 1957 received an interim teaching certificate from the Ontario educational authorities. In the autumn of 1957 Mrs. Y[redacted] was informed by those authorities that in order to continue teaching she would have to become a Canadian citizen and that her interim certificate would not be renewed for the 1958 academic year unless she make application for Canadian citizenship. In December 1957 she notified the appropriate authorities that she intended to apply for naturalization after January 5, 1958, her 21st birthday. On February 27, 1958 she applied for naturalization, and on June 12, 1958 after making the following declaration and oath of allegiance was granted Canadian citizenship.

1/ Section 349(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1481(a)(1), provides that:

> Sec. 349. (a) From and After the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --
>
> (1) obtaining naturalization in a foreign state upon his own application, . . .

> I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen.
>
> I swear that I will be faithful and bear true allegiance to Her Majesty Q[redacted] E[redacted] the Second, her heirs and successors, according to law, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen. *So* Help Me God. 2/

A month later she married [redacted] [redacted] a Canadian citizen. It appears that in 1959 she stopped teaching. Three children were born to appellant in Canada between 1960 and 1965.

American authorities became aware that Mrs. [redacted] had obtained naturalization when she applied for a passport at the Consulate General in Toronto in the summer of 1977. She states that she was informed that "my passport could not be renewed [sic] because of my status as a Canadian citizen." She completed a "preliminary questionnaire," no copy of which exists but which evidently asked her to supply certain information about herself and her performance of the expatriative act. The Consulate General then requested that the Canadian authorities confirm Mrs. [redacted] naturalization. Before a reply had been received from the Canadian citizenship authorities, the Consulate General sent Mrs. [redacted] a letter on September 19, 1977 informing her that she might have expatriated herself by obtaining naturalization in Canada, and that she had the right to submit information and evidence for the Department to consider in adjudicating her case. She was asked to complete a form that solicited particulars about the expatriating act she performed. The Consulate General stated that if she did not respond to the letter within 60 days it would be assumed that she did not intend to submit information or evidence for the Department to consider in determining her citizenship status. A postal receipt signed "G. [redacted] attests that the Consulate General's letter was received at appellant's address at Don Mills, Ontario on September 26, 1977.

2/ There is no copy in the record of the declaration and oath of allegiance appellant swore. However, Canadian citizenship authorities attested by letter to the Consulate General dated December 29, 1978, that she had subscribed to a declaration of renunciation and oath of allegiance. Furthermore, we note that in 1958 applicants for Canadian citizenship who were not British subjects were required to make both the declaration and oath quoted above. The oath was prescribed by schedule II of the Canadian Citizenship Act of 1946. The declaration of renunciation of all other allegiance was prescribed by section 19(1) of the Canadian Citizenship Regulations. That section of the regulations was declared ultra vires by the Federal Court of Canada on April 3, 1973.

The Consulate General's records indicate that on November 14, 1977 Mrs. [redacted] "completed registration application, 178A [these two forms are applications for a U.S. passport; presumably she was asked to complete them for information purposes only], Questionnaire and Questionnaire Concerning Intent [these are intended to elicit information to facilitate the Department's consideration of her case]. No copies of the foregoing documents are in the record, although presumably the Consulate General forwarded them to the Department.

In early May 1978 the Department, which presumably had evaluated Mrs. [redacted] submissions, instructed the Consulate General to send her a "preliminary loss of nationality letter," and to ask her for the date on which her employment as a teacher began and the date of her application for naturalization. On June 30, 1978 the Canadian authorities confirmed that Mrs. [redacted] had obtained naturalization. In July 1978 appellant forwarded to the Consulate General information it had requested that she submit. Then on August 11, 1978 the Consulate General sent Mrs. [redacted] a preliminary loss of nationality letter. In that letter the Consulate General indicated that the Department had made a preliminary determination that she had expatriated herself, and informed her as follows:

> Your voluntary naturalization as a citizen of Canada is regarded as highly persuasive evidence of an intent to relinquish United States nationality, The information presently of record relating to the surrounding circumstances, motives, and purposes of your act, does not appear sufficient to negate such intent.
>
> In accordance with the established procedures you are free to submit to this Consulate General within 60 days from the date of this letter, for transmission to the Department of State, any additional information or evidence you believe should be considered in reaching a decision in your case.
>
> ...If we do not receive such information or evidence within 60 days, ...the Department of State's decision will have to be made on the evidence already available. I have been instructed to inform you that the evidence now available is of such a nature that under the law it is likely to result in a determination that you have lost the nationality of the United States unless that evidence is overcome by other evidence you may submit.

The letter reached appellant's home on August 16, 1979 as attested by the postal receipt signed that day by [redacted] evidently appellant's 12-year old son. There is no evidence in the record that appellant replied to the Consulate General's letter.

On August 31, 1978 the Department instructed the Consulate General to execute a certificate of loss of nationality (CLN) in Mrs. [redacted] name upon expiry of the 60-day period allowed for her to respond to the Consulate General's letter. The Consulate General's records further show that the Department instructed the Consulate General to submit to the Department any additional information or evidence Mrs. [redacted] might submit "together with the conoff's evaluation of the new info or evidence."

In response to the Consulate General's request of September 7, 1978 for additional information about Mrs. [redacted] naturalization, the Canadian authorities by letter dated December 29, 1978 informed the Consulate General that Mrs. [redacted] had applied for naturalization on February 27, 1958 and that on June 12, 1958 when she was granted a citizenship certificate she subscribed to a declaration of renunciation of all other allegiance and an oath of allegiance.

Pursuant to the Department's instructions and the requirements of section 358 of the Immigration and Nationality Act, a consular officer executed a CLN in Mrs. [redacted] name on January 8, 1979. 3/ The official certified that Mrs. [redacted] acquired United States nationality at birth; that she obtained naturalization in Canada upon her own application; and thereby expatriated herself under the provisions of section 349(a)(1) of the Immigration and Nationality Act. The Consulate General forwarded the CLN to the Department under cover of a memorandum which read as follows:

3/ Section 358 of the Immigration and Nationality Act, 8 U.S.C. 1501, reads:

Sec. 358. Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates.

Enclosed is the Certificate of Loss of Nationality prepared under Section 349(a)(1) of the INA in Mrs. [redacted] name. Also enclosed is the statement recently received from the Canadian citizenship authorities stating the date Mrs. [redacted] applied for Canadian citizenship as well as the file copy of the preliminary finding loss letter and the signed postal receipt returned by the Canadian postal authorities.

Mrs. [redacted] seems to have inquired about the disposition of her case on several occasions over the ensuing months. The card the Consulate General maintained on Mrs. [redacted] shows the following:

Jan. 19, 1979	Memorandum to Dept. that subject contacted this office again inquiring about her case
Apr. 9, 1979	Memorandum to Dept. inquiring concerning case of subject
June 11, 1979	Telegram to Dept. requesting approval of subject's Certificate of Loss of Nationality

The Department approved the CLN on August 24, 1979, an action that constitutes an administrative determination of loss of nationality from which a timely and properly filed appeal may be taken to the Board of Appellate Review. The Department sent a copy of the approved CLN to the Consulate General to forward to Mrs. [redacted] On the reverse of the CLN procedures for taking an appeal to the Board of Appellate Review were set forth. According to the Consulate General's records, it forwarded the CLN to Mrs. [redacted] on September 19, 1979 "under covering letter." There is no copy of the covering letter in the record. Nor is there any indication whether the letter and its enclosure were sent to Mrs. [redacted] by registered mail. There is no postal receipt in the record to indicate that she received the CLN. On November 19, 1979 the Consulate General "carded" Mrs. [redacted] file and then destroyed it.

In June 1985 Mrs. [redacted] called at the Consulate General to inquire about her citizenship status and that of her three children. She completed a form authorizing the Consulate General to request a search of the Canadian citizenship records; an affidavit of physical presence in the United States; a form for determining United States [redacted]enship status; and an affidavit. A consul wrote to Mrs. [redacted] on June 28, 1985 to inform her that a certificate of loss of nationality had been approved in her name in 1979 and that the Department's decision might be appealed. Her children did not, the letter stated, have a derivative claim to United States citizenship since she had insufficient physical presence in the United States prior to their birth to pass citizenship to them.

On September 16, 1985 appellant initiated this appeal pro se. Subsequently she retained counsel who filed a brief in support of the appeal. Counsel submits that:

> Although a determination was made that a Certificate of Loss of Nationality should be issued in Mrs. [redacted] case, a complete review of the facts leading up to Mrs. [redacted] actions in applying for Canadian citizenship has never been conducted. It is the voluntariness and specific intent of Mrs. [redacted] actions that must be addressed at this time to make a full and fair determination of her U.S. citizenship.

Specifically, counsel argues that Mrs. [redacted] naturalization was involuntary; "it was a matter of career survival." Furthermore, counsel contends, Mrs. [redacted] lacked the requisite intent to relinquish her United States citizenship, for she did not knowingly relinquish it.

II

Whether the Board may entertain an appeal filed six years after the Department of State determined that appellant lost her United States nationality is the threshold issue in this case. The Board's jurisdiction is dependent upon a finding that the appeal was filed within the limitation prescribed by the applicable regulations. This is so because timely filing is mandatory and jurisdictional. United States v. Robinson, 361 U.S. 220 (1960). Thus, if an appellant, providing no legally sufficient excuse, fails to take an appeal within the prescribed limitation, the appeal must be dismissed for want of jurisdiction. See Costello v. United States, 365 U.S. 265 (1961).

In August 1979 when the Department approved the certificate of loss of nationality that was issued in this case, federal regulations prescribed the following limitation on appeal:

> A person who contends that the Department's administrative holding of loss of nationality or expatriation in his case is contrary to law or fact shall be entitled, upon written request within a reasonable time after receipt of notice of such holding, to appeal to the Board of Appellate Review.

Section 50.60 of Title 22, Code of Federal Regulations (1967-1979), 22 CFR. 50.60.

Consistently with the Board's practice in cases where the determination of loss of nationality was made prior to November 30, 1979, we will apply the foregoing limitation here. 4/

What constitutes reasonable time depends on the facts of the case, taking into account a number of considerations, including the interest in finality, the reason for the delay, and prejudice to other parties. Ashford v. Steuart, 657 F.2d 1053, 1055 (9th Cir. 1981). See also Lairsey v. Advance Abrasives Co., 542 F.2d 928, 940 (5th Cir. 1976), citing 11 Wright & Miller, Federal Practice & Procedure section 2866 at 228-229:

> What constitutes reasonable time must of necessity depend upon the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner.

When Mrs. [redacted] filed her appeal pro se in the autumn of 1985, she explained her delay in appealing as follows:

> Inasmuch as no earlier notice of Loss of Nationality or right of appeal was afforded me, I kindly request that your office review my status as an American citizen based upon the enclosed completed forms, Affidavits and accompanying Exhibits.

In acknowledging receipt of her appeal, the Chairman of the Board of Appellate Review explained that thelimitation on appeal in her case would be within a reasonable time after receipt of notice of the Department's determination of loss of her nationality. He continued:

> ...Whether your appeal may be deemed to have been taken within a reasonable time depends on the facts of your case. We note that you state you never received notice that the Department had approved a certificate of loss of nationality in your case, Any additional information

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4/ On November 30, 1979 new federal regulations were promulgated for the Board of Appellate Review. 22 CFR Part 7. 22 CFR 7.5(b) prescribes a limitation on appeal of one year after approval of the certificate of loss of nationality.

> you are able to submit to the Board concerning that matter would be helpful to us.

Counsel for appellant filed a brief in support of the appeal in March 1986 and asserted merely that the Board had jurisdiction to hear and decide the appeal pursuant to section 50.60 of Title 22, Code of Federal Regulations (1967-1979). Counsel did not directly address the issue of timely filing but submitted that:

> Although a determination was made by the Department of State to issue a Certificate of Loss of Nationality, a complete review of the facts leading to the Appellant's actions in applying for Canadian citizenship has never been conducted.
>
> A review by the Board of Appellate Review is Mrs. [redacted] sole opportunity to receive a full and fair determination of her U.S. citizenship based on the facts of her case.

As we have seen, the Department sent a copy of the approved certificate of loss of nationality to the Consulate General on August 24, 1979 to forward to appellant. According to the records of the Consulate General, the certificate was "forwarded to subj. under covering letter" on September 19, 1979. There is no indication whether the letter was sent by registered mail; nor is there a postal receipt in the record. But, it would be reasonable to presume that the Consulate General's letter reached appellant as did the two earlier letters the Consulate General sent her about her citizenship status; she appears to have lived at the address to which the letter was sent since at least 1977. But it is probably impossible to know for certain whether notice of the loss of her citizenship duly reached Mrs. [redacted] in 1979.

Here, however, is a case where constructive notice of the loss of her nationality may fairly be imputed to the party. As we have seen, the Consulate General, on the instruction of the Department, wrote to Mrs. [redacted] on August 11, 1978 to inform her that unless she were able to [redacted] persuasive evidence to warrant a different finding, the Department would make a determination that she had expatriated herself. Can there by any doubt that appellant was duly on notice that unless she acted, her expatriation would inevitably follow? So, even had she not, as she alleged, received the approved CLN with the accompanying appeal procedures, appellant was fully alerted to the virtual certainty that she would be considered to have expatriated herself. Furthermore, it seems certain that the Consulate General informed appellant that it had executed a certificate of loss of nationality in her name in January 1979. The record is also clear that after January she inquired about

whether the Department had acted on the certificate. So, whether or not she received actual notice of the Department's determination of her expatriation, she was on constructive notice of that probability. Why she should make several inquiries during the winter and spring of 1979 and then apparently stopped in the summer is mystifying. Had she done so at the end of the summer she would, of course, have learned the actual state of affairs and also have been informed that she might appeal the Department's decision to this Board.

The Department and the Consulate General duly carried out their legal duties toward appellant. A person who has received official notice of the probable loss of nationality cannot absolve herself of all responsibility and rest passively on an unsupported allegation that she never received notice of a holding of loss of nationality from the Department.

Appellant had a duty in the circumstances of this case to make timely inquiry about her United States citizenship status long before 1985. If a person has actual knowledge of facts which would lead an ordinary prudent man to make further investigation, the duty to make inquiry arises and the person is charged with knowledge of facts which inquiry would have disclosed. Nettles v. Childs, 100 F.2d 952 (1939). Similarly, Hux v. Butler, 339 F.2d 696 (1964), where the court stated: "...where anything appears which would put an ordinary man upon inquiry, the law presumes that such inquiry was actually made and fixes notice upon the party as to all the legal consequences."

A limitation on appeal is designed to afford an aggrieved party sufficient time to prepare a case showing wherein the Department erred in law or fact in determining that one had lost United States citizenship. A limitation is also intended to compel the exercise of the right of recourse within a restricted period of time while the recollection of the events involved is fresh in the minds of both appellant and the agents of the Department of State. Here, there has been no showing of a need for six years to prepare an appeal to the Board. Furthermore, when the appeal was filed, twenty-seven years had transpired from the time appellant performed the statutory expatriating act. The possibilities of reconstructing accurately the events of twenty-seven years ago are now remote, especially since so little evidence contemporary with appellant's performance of the expatriative act is now available.

In the circumstances of this case where there has been no showing of why an earlier appeal could not have been taken, the interest in finality and stability is entitled to great weight. There must be an end to litigation at some point.

III

It is our conclusion that appellant's delay of six years in taking an appeal is unreasonable in the circumstances of her case. The appeal is therefore time-barred. Lacking jurisdiction to consider a time-barred appeal, we dismiss it.

Given our disposition of the case, we do not reach the substantive issues presented.

Alan G. James, Chairman

J. Peter A. Bernhardt, Member

Howard Meyers, Member